Damai Laut Golf Resort Sdn Bhd v Sim Mee Yong (t/a Messrs Kantan Jaya)

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S7–22–320 OF 1999
MOHD HISHAMUDIN J
29 MARCH 2000

Civil Procedure *— Judgments and orders — Application for setting aside — Ex parte order granted in appeal to judge in chambers — Whether order can be set aside under O 32 r 6 of Rules of the High Court 1980*

The deputy registrar had ordered that the present suit by the plaintiff against the defendant for breach of contract be transferred to the sessions court. The plaintiff appealed to the judge in chambers. On the day of the hearing of the appeal, the plaintiff's counsel was present, but both the defendant and his counsel were absent. The judge proceeded to hear the appeal in the absence of the defendant and having heard the submission of counsel for the plaintiff, gave judgment in favour of the plaintiff. The defendant applied to set aside the judge's decision under O 32 r 6 of the Rules of the High Court 1980 ('the RHC'). In the supporting affidavit, it was stated that counsel was absent on the day of the hearing because he had to be rushed to the hospital and a medical certificate was exhibited. The plaintiff submitted that the defendant's application to set aside was procedurally incorrect and that the defendant should have appealed against the judge's decision. As to O 32 r 6, it was submitted that this provision does not apply to an ex parte order made pursuant to an appeal to a judge in chambers.

Held, allowing the application:

(1) As the order that the judge made was an ex parte order, O 32 r 6 clearly applies. An application to set aside may be made under this provision. The heading for O 32 implies that the provisions of O 32 govern all applications and proceedings in chambers except in specific cases where the law clearly provides otherwise (see p 490F–G).

(2) An appeal to a judge in chambers pursuant to O 56 of the RHC (as in the present case), although is not an application in chambers, is nevertheless a proceeding in chambers. The provision of O 32 r 11(1) dispels any doubt as to the nature of a proceeding of an appeal to a judge in chambers. Thus any order made ex parte in a proceeding in chambers in an appeal to a judge in chambers comes within the ambit of O 32 r 6. There is nothing in O 56 or elsewhere in the RHC that expressly states or implies that O 32 r 6 does not apply to an ex parte order made on an appeal to a judge in chambers (see p 491A, C–D).

(3) As a matter of procedure, the application was proper by virtue of O 32 r 6. On the merits, as counsel in his affidavit had given a

valid reason for his absence, the application was therefore allowed (see p 492E-F).] A

[Bahasa Malaysia summary

Timbalan pendaftar telah memerintahkan bahawa guaman yang dihadapkan oleh plaintif terhadap defendan kerana perlanggaran kontrak dipindahkan ke mahkamah sesyen. Plaintif telah merayu kepada hakim dalam kamar. Pada hari perbicaraan rayuan tersebut, peguam plaintif telah hadir, tetapi kedua-dua defendan dan peguam beliau tidak hadir. Hakim telah meneruskan untuk mendengar rayuan tersebut dengan ketidakhadiran defendan dan setelah mendengar hujah peguam plaintif, telah memberikan penghakiman menyebelahi plaintif. Defendan memohon untuk mengetepikan keputusan hakim tersebut di bawah A 32 k 6 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT'). Di dalam afidavit sokongan telah dinyatakan bahawa peguam tidak hadir pada hari perbicaraan kerana beliau terpaksa digegaskan ke hospital dan satu sijil sakit telah diekshibitkan. Plaintif menghujahkan bahawa permohonan defendan untuk satu penepian adalah tidak betul dan bahawa defendan hendaklah merayu terhadap keputusan hakim. Berdasarkan A 32 k 6, adalah dihujahkan bahawa peruntukan ini tidak terpakai untuk perintah ex parte yang dibuat berikutan satu rayuan kepada hakim dalam kamar.

B C D E

Diputuskan, membenarkan permohonan tersebut:

(1) Memandangkan perintah yang dibuat oleh hakim adalah satu perintah ex parte, A 32 k 6 jelas terpakai. Suatu permohonan untuk penepian boleh dibuat di bawah peruntukan ini. Tajuk A 32 menandakan bahawa peruntukan A 32 mengawal semua permohonan dan prosiding dalam kamaw kecuali dalam kes-kes spesifik di mana undang-undang mengatakan sebaliknya (lihat ms 490F–G). F

(2) Rayuan kepada hakim dalam kamar berikutan A 56 KMT (seperti mana di dalam kes ini), walaupun bukan satu permohonan dalam kamar, adalah walau bagaimanapun suatu prosiding dalam kamar. Peruntukan A 32 k 11(1) melenyapkan apa-apa keraguan berhubung bentuk suatu prosiding rayuan kepada seorang hakim dalam kamar. Oleh itu, apa-apa perintah yang dibuat ex parte di dalam suatu prosiding dalam kamar jatuh di bawah linkungan A 32 k 6. Tiada apa dalam A 56 atau di mana-mana dalam KMT yang menyatakan dengan jelas atau tersirat bahawa A 32 k 6 tidak terpakai untuk satu perintah ex parte yang dibuat atas satu rayuan kepada seorang hakim dalam kamar (lihat ms 491A, C–D). G H

(3) Sebagai satu perkara prosedur, permohonan tersebut adalah betul sehubungan dengan A 32 k 6. Atas merit, sebagai peguam, di dalam afidavit beliau telah memberikan sebab yang munasabah I

untuk ketidakhadiran beliau, maka permohonan tersebut oleh demikian adalah dibenarkan (lihat ms 492E–F).]

Notes

For a case on application for setting aside of judgments and orders, see 2(2) *Mallal's Digest* (4th Ed, 1998 Reissue) para 2729.

Cases referred to

Delcont (M) Sdn Bhd v Motor Sport International Ltd & Ors [1996] 5 MLJ 51 (refd)

Loo Chay Meng v Ong Cheng Hoe (Gamuda Sdn Bhd, Garnishee) [1990] 1 MLJ 445 (refd)

Permata Chartered Merchant Bank Bhd v Hiew Fook Realty (Holdings) Sdn Bhd & Ors [1992] 1 MLJ 73 (refd)

Legislation referred to

Rules of the High Court 1980 O 18 r 19, O 28, O 32 r 6, O 32 r 11(1), O 56 r 2

K Subramaniam (*Subra & Associates*) for the applicant/defendant.
PY Au Yong (*Cheah Teh & Su*) for the respondent/plaintiff.

Mohd Hishamudin J: This is an interlocutory application by the defendant to set aside the decision of this court made on 21 January 2000.

21 January is the date of the hearing of the appeal before me by the plaintiff against the decision of the learned deputy registrar of 1 November 1999. The learned deputy registrar in her decision, on an interlocutory application by the defendant to strike out the writ summons and statement of claim under O 18 r 19 of the Rules of the High Court 1980 ('the RHC'), had ordered that the present suit by the plaintiff against the defendant for breach of contract be transferred to the sessions court. The plaintiff, dissatisfied with the decision, appealed to the judge in chambers. On the day of the hearing of the appeal, the appellant's/plaintiff's counsel was present, but both the defendant and his counsel were absent. I proceeded to hear the appeal in the absence of the defendant. Having heard the submission of the learned counsel for the plaintiff as to why the appeal should be allowed, I gave judgment in favour of the plaintiff. I allowed the appeal with costs. My decision was based purely on the merits of the case.

The present application by the defendant to set aside my decision is made under O 32 r 6 of the RHC. This rule reads:

> Order made ex parte may be set aside
>
> The court may set aside an order made ex parte.

In the supporting affidavit deposed by En Subramaniam (who is also the applicant's/defendant's counsel in the present application) who was supposed to appear as counsel on behalf of the appellant/defendant on that

day it is stated that he was absent on the day of the hearing because on the morning of that date he suffered pain in the left leg and had to be rushed to the University Hospital. He exhibited a medical certificate issued by the Hospital.

The learned counsel for the respondent/plaintiff, Cik PY Au Yong, does not dispute the reason given by En Subramaniam for his absence and concedes that it is a valid reason. She, however, objects to the present application on procedural grounds. She submits that the present application to set aside is, procedurally, not correct. She argues that the defendant should have appealed against this court's decision of 21 January. As to O 32 r 6 of the RHC, she submits that this provision does not apply to an ex parte order made pursuant to an appeal to a judge in chambers. She cites *Delcont (M) Sdn Bhd v Motor Sport International Ltd & Ors* [1996] 5 MLJ 51. In this case referred to, an application by the defendant to set aside the issue and service of the writ and claim was allowed by the registrar. The plaintiff appealed to the judge in chambers. At the hearing of the appeal, the plaintiff and its counsel were present but both the defendant and its counsel were absent. The court proceeded with the hearing and submission and gave judgment in favour of the plaintiff. Subsequently, the defendant applied to set aside the judgment relying on O 32 r 6 of the RHC. Kamalanathan Ratnam JC (as he then was) ruled that O 32 r 6 of the RHC does not apply in respect of the order so made and that the defendant should have filed (with leave) an appeal to the Court of Appeal under O 56 r 2of the RHC. In coming to his decision, the learned judge, however, did take into account and consider, inter alia, the provisions of O 32 r 11(1) of the RHC and the judgment of VC George J (as he then was) in *Permata Chartered Merchant Bank Bhd v Hiew Fook Realty (Holdings) Sdn Bhd & Ors* [1992] 1 MLJ 73.

With respect, in the present case, I take a different view. It is my judgment that as the order that I made was an ex parte order (that it is an ex parte order. although the appeal was to be heard inter parte is not disputed by Cik Au Yong; also see *Loo Chay Meng v Ong Cheng Hoe (Gamuda Sdn Bhd, Garnishee)* [1990] 1 MLJ 445) therefore O 32 r 6 of the RHC clearly applies. An application to set aside the order may be made under this provision. The heading for O 32 of the RHC reads:

APPLICATIONS AND PROCEEDINGS IN CHAMBERS.

This implies that the provisions of O 32 of the RHC govern all applications *and proceedings in chambers* (except in specific cases where the law clearly provides otherwise, eg O 28 of the RHC which deals with originating summons proceedings). In *Loo Chay Meng*, although the case concerns an *application* to set aside an ex parte order previously made on an inter parte application in chambers (as opposed to a proceeding in chambers), nevertheless, the following dicta of VC George is relevant (at p 446):

> Order 32 sets out the rules for 'Applications and Proceedings in Chambers'. These rules in O 32 have general application to applications and *proceedings in chambers* unless there are specific rules elsewhere that expressly or even impliedly do away with the said rules of general application. (Emphasis added.)

In my opinion, an appeal to a judge in chambers pursuant to O 56 of the RHC (as in the present case), although is not an application in chambers, is nevertheless a *proceeding* in chambers. I fail to see how anyone familiar with the proceeding of an appeal to a judge in chambers could argue otherwise. Indeed, O 32 of the RHC expressly recognises that an appeal to a judge in chambers is a proceeding in chambers. There is specific mention of an appeal to a Judge in Chambers in its provisions. Order 32 r 11(1) of the RHC states:

> Power to direct hearing in court
>
> The Judge in Chambers may direct that any summons, application or *appeal* shall be heard in court or shall be adjourned into court to be so heard if he considers that by reason of its importance or for any other reason it should be so heard. (Emphasis added).

To my mind, the above provision dispels any doubt as to the nature of a proceeding of an appeal to a judge in chambers. The drafters of the RHC would not have expressly included 'appeal' in the above sub-r (1) of r 11 if they did not regard an appeal to a judge in chambers as a proceeding in chambers. Thus any order made ex parte in a proceeding in chambers in an appeal to a judge in chambers comes within the ambit of O 32 r 6 of the RHC. And I wish to add that I find nothing in O 56 of the RHC (the rules that deal with appeals to a judge in chambers from decisions of a registrar) or elsewhere in the RHC that expressly states or implies that O 32 r 6 of the RHC does not apply to an ex parte order made on an appeal to a judge in chambers.

In the context of the present case, *Permata Chartered Merchant Bank*, although not quite relevant for the purpose of the case before me, is of some interest, and I should perhaps touch on that case. Like the present case, that case involves an appeal to a judge in chambers from a decision of a registrar on an interlocutory application. Unlike the present case, however, in that case it was the appellants/defendants who were absent on the day of the hearing: the respondent/plaintiff and counsel were present. Unlike the present case, there the appeal was struck off by the judge by reason of the absence of the appellant and counsel. Also unlike the present case, there, the application, made subsequently by the appellants/defendants, was to reinstate the appeal (not a 'setting aside' application). The respondent by way of preliminary objection opposed the application to reinstate on the grounds that the court had no jurisdiction to reinstate the appeal. VC George J rejected the preliminary objection and ruled that the application to reinstate was proper. The learned judge justified his ruling in the following manner:

> The preliminary objection fails. The court has the jurisdiction to consider an application to restore an appeal that was struck off without it being heard on account of the appellant having been absent. The court should read into O 56 implied provisions necessary to deal with the situation. The detailed provisions in O 55 and in O 32 provide procedures that could and should be implied as being provisions to be read into O 56.

Although strictly speaking the order before the learned judge (ie the order to strike out the appeal) was an *ex parte* order as it was made in the absence of the appellant and counsel, it is somewhat puzzling that the learned judge, in his judgment, did not touch specifically on O 32 r 6 of the RHC. It could not have been because O 32 r 6 of the RHC refers to *setting aside* whereas the application before VC George J was to *reinstate*. That would be too technical and too superficial a reason. Indeed, the learned judge, notwithstanding the words '... and proceedings in chambers' in the heading of O 32 of the RHC, the word 'appeal' in sub-r (1) of r 11 of O 32 of the RHC, and his previous dicta in 1990 in *Loo Chay Meng* (which I have referred to earlier), appears to *assume* that O 32 of the RHC does not apply to a proceeding in chambers of an appeal to a judge in chambers and held that there is a 'lacuna' in the law (and as a consequence of the 'lacuna' the court should 'read into O 56 implied provisions'). The learned judge said (at p 76):

> It would seem then that in respect of what should happen at the hearing of an appeal from the registrar to a judge there is a hiatus, a lacuna, in the rules of procedure.

With respect, although I agree with the learned judge's decision (that in the case before his lordship the court has jurisdiction to restore the appeal), nevertheless, in view of what I have said earlier in this judgment, I am unable to share the above reasoning of his lordship. In any case, I need not go further for the facts and issue before VC George J were different from the facts and issue that are now before me.

In conclusion, I hold that as matter of procedure this application before me is proper by virtue of O 32 r 6 of the RHC. On the merits, as the learned counsel in his affidavit has given a valid reason for his absence, this application is therefore allowed but the defendant shall pay costs in respect of the appeal and this application to the plaintiff.

Applaication allowed.

Reported by Jafisah Jaafar